FILED
OCT 28 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 68-5027,

EARNEST J. AIKENS, JR.,
v. *Petitioner,*
CALIFORNIA,
Respondent.

No. 69-5003,

WILLIAM H. FURMAN,
v. *Petitioner,*
GEORGIA,
Respondent.

No. 69-5030,

LUCIOUS JACKSON, JR.,
v. *Petitioner,*
GEORGIA,
Respondent.

On Writs of Certiorari to the
Supreme Court of Georgia and
Supreme Court of California

BRIEF AMICI CURIAE OF THE WEST VIRGINIA COUNCIL OF CHURCHES, CHRISTIAN CHURCH (DISCIPLES) IN WEST VIRGINIA, and UNITED METHODIST CHURCH, WEST VIRGINIA CONFERENCE

PAUL RAYMOND STONE,
Attorney for Amici
1901 Huber Road
Charleston, W.Va.

TABLE OF CONTENTS

Page

Statement of Amici Interest 2

Argument

I. Capital Punishment is Cruel and Unusual punishment in the Sense, among other things, that its imposition infringes the Prisoners' Religious Freedom in a manner which constitutes Mental Cruelty 3

II. Other Bases of Mental Cruelty resulting from the Death Penalty 11

Conclusion 19

TABLE OF AUTHORITIES

Page

Cases:

Founding Church of Scientology v. U.S., 409 F.2d 1146 (DC Cir.1969) 5

Glenn v. Wilkinson, 309 F.Supp.411(DC No.1970).. 3

Holt v. Sarver, 309 F. Supp 362(ED Ark.1970).... 19

In re Jenison, 375 US 14 (1963)..... 18

Jackson v. Bishop, 404 F.2d571 (8thCir.1968)..15,17

Jackson v. Bishop (Dist.Ct.opin.),268 F.Supp 804 (E.D. Ark.1967)..... 16

NAACP v. Button, 371 US 415 (1963)..... 4

People v. Woody, 394 P.2d 813 (1964)..... 18

Robinson v. California, 370 US 660 (1962)..... 3

Sinclair v. Henderson, No.30025(Nov.17, 1970-5th cir.)..... 17

Sharp v. Sigler, 408 F.2d 966(8th Cir.1969)... 3

Sherbert v. Verner, 374 US 398 (1963)..... 4,9,18

Solesbee v. Balkom, 339 US 9 (1950)..... 15

State v. Gee Jon, 211 P.2d 676 (1923)..... 17

Trop v. Dulles, 356 US 86 (1958)..... 7,8,11

U.S. v. Ballard, 322 US 78 (1944)..... 5,6

Weems v. U.S., 217 US 349 (1910) 8

West Virginia State Board of Education v. Barnette, 319 US 624 (1943)..... 4

TABLE OF AUTHORITIES
(Continued)

Page

Constitutions:

Constitution of the United States, First Amendment 3

Other Authorities:

Hinestone and McCahee, "Reaction to Extreme Stress: Impending Death by Execution", American Journal of Psychiatry, Nov. 1962.. 15

Crime in the United States (FBI-Uniform Crime Reports), 1959 through 1969 12

Harvard Law Review 83:1773 (June 1970)..... 13

Jour.Crim.Law,Cr.& Police Science 60:289 (Sept 1969) 3

Lamott, "Chronicles of San Quentin-The Biography of a Prison" (McKay Publishing Company)- 1961 7,16,17

Marcus and Weisbrodt, "The Death Penalty Cases", 56 Calif. Law Rev.1268 et seq. (Aug.-Nov.1968) 17

New Testament (RSV), Luke 23:43 10

Roper Opinion Poll, Feb.9, 1958 14

The Death Penalty in America (Bedau, 1968) ... 13

Wisconsin Law Rev., Vol.1966,p.217 (1966) At pp.280,281 ... 18

TABLE OF AUTHORITIES
(Continued)

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Statement of the Interest of Amici

The West Virginia Council of Churches is an organization whose affiliate members represent all the major Protestant denominations in the State, participating with the Roman Catholic Archdiocese of Wheeling; its Division of Life and Work is its arm in the Council's concern with major moral and social issues of our time. The West Virginia Council of Churches is on record with a strong stand against the imposition of capital punishment.

The Christian Action and Community Service Department (of which counsel for the amici is a member) of the Christian Church (Disciples) in West Virginia, is the Church's action arm in its stand on moral issues in the secular world; the Disciples of Christ is the first major Protestant denomination having its origins in the United States. The World Convention of the Disciples of Christ has resolved strongly against capital punishment, as being morally defenseless.

The United Methodist Church has had a long history of involvement in helping solve America's problems; its Board of Social Concerns of the West Virginia Annual Conference represents it in the stand taken herein--which reflects the opposition, both state and national--of Methodists against the death penalty.

Consent of all parties has been secured for the submission of this *amici curiae* brief (letters thereof are filed with the Clerk of the Court).

ARGUMENT

I.

CAPITAL PUNISHMENT IS CRUEL AND UNUSUAL PUNISHMENT IN THE SENSE, AMONG OTHER THINGS, THAT ITS IMPOSITION INFRINGES THE PRISONERS' RELIGIOUS FREEDOM UNDER THE FIRST AMENDMENT IN A MANNER WHICH CONSTITUTES MENTAL CRUELTY

The First Amendment to the United States Constitution, in addition to providing for freedom of speech, is the source of our precious heritage of religious freedom (including the right to be free from unnecessary prohibitions on the exercise of our religion);

> *Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof. (emphasis supplied)*

It is so well-settled, as not to require citation, that the foregoing is also a restraint on state action (as is the cruel and unusual punishment proviso, by operation of the Fourteenth Amendment[1]).

It is conceded that there are limits on the right to exercise one's religious beliefs[2], but these limitations have heretofore

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[1] *Robinson v. California*, 370 U.S. 660 (1962)

[2] *Sharp v. Sigler*, 408 F.2d 966(8th Cir.1969); *Journal of Criminal Law, Criminology, and Police Science* 60:299 (Sept.1969). Cf. *Glenn v.Wilkinson*,309 F.Supp.411,417,418 (DC,Mo. 1970),but even in this case, it is noted,

been judicially applied--and, we submit, should continue to be applied--only to situations where the practice or the exercise of the claimed religious right in some way interferes with a "compelling state interest"[3] (e.g., the safety or welfare of others, including considerations of prison discipline, etc.).

We respectfully submit that there cannot be a sufficiently-overriding state interest in perpetuating the death penalty when due regard is also taken of the right of a prisoner to the free exercise of his religion involved in his efforts--while incarcerated --to seek his own spiritual salvation(or conversion experience), which is taught as fundamental by all of the major Protestant denominations, as well as in the Roman Catholic and other faiths. The "snuffing out" of the prisoner's life will deprive him of all further earthly opportunity to strive toward such salvation, even though knowledge of its attainment--prior to death--may not be the subject of absolute certainty (even St.Paul expressed a fear of being found "wanting", in the final analysis, based on his own scriptural assertions).

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access to Catholic clergy and rites,which were theretofore not provided, were ordered by the court for the prisoner(who was on death row).

[3] *Sherbert v. Verner,* 374 U.S. 398,406(1963) *NAACP v. Button,* 371 U.S. 415,438(1963); *West Virginia State Board of Education v. Barnett* 319 U.S. 624,644 (1943).

The state, in its provision for prison chaplains and allowance of devotionals,etc., has recognized some sort of obligation in respect to the spiritual needs of its death row inmates by providing a limited amount of help to a prisoner in his efforts toward an exercise of his religious beliefs; however, viewed in a critical light and with discerning judgment, this activity on the part of the state is quite superficial and perfunctory when compared with the actual spiritual needs of most of its death row inmates. There is no substitute for the element of time (i.e., the right of the prisoner to be free from the premature ending of his life at the hands of the state, which also ends all his temporal efforts of continued striving toward spiritual progress in ultimately finding God); the killing in the execution chamber of unredeemed men represents one of the major evils inherent in capital punishment, and makes a mockery and travesty of our protestations--under the aegis of our major Faiths--of the redemptive capacity of man (indeed, it is utterly inconsistent with one of our basic Christian tenets that any man is potentially salvageable....with the possible exception of those who have committed the so-called "unpardonable sin" of blasphemy against the Holy Ghost which is not a capital offense under the laws of any of our states!)

It is noted that the wisdom or logic underlying a particular religion--the free exercise of which is sought--is not a proper matter for the courts to impugn, absent any infringement on health or safety as a result thereof[4].

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[4] *U.S. v. Ballard*, 322 U.S. 78 (1944); see *Founding Church of Scientology v. U.S.*, 409 F.2d 1146 (D.C.Cir.1969).

A belief may be "incredible, if not prepos
terous"[5] . . . in respect to a claimed religi
freedom.

It matters not whether the acquisition
of salvation, or conversion, while still o
earth and alive is sound doctrine--theolog
cally speaking--or whether the truth is th
we may all be given a "second chance" by a
beneficent God in the hereafter; it would
considerably more spiritually palatable (a
conducive to tranquility, rather than the
herently cruel state of mental anguish now
suffered by death row inmates) were this
beneficence to take the form of a favorabl
ruling by the U.S.Supreme Court. A favorab
ruling would certainly be in consonance wi
the Eighth and Fourteenth Amendments (as a
result of relief of the mental and spiritu
cruelty due to the adverse psychological
pressures involved in the formidable,perma
deprivation--through the execution of deat
of the First Amendment right to a continue
opportunity to exercise religious efforts
toward salvation). We submit that the word
"free" in the First Amendment--while not
implying a right to be free from incarcera
--clearly imports a right to seek one's sa
tion free from any impending urgency and
inhibition of one's religious thought proc
as a result of the specter of the electric
chair or gas chamber. Not only is the oppr
sive (indeed,panicky) environment generate
these implements of execution--and their
portent for ending the prisoner's life--
unconducive to the prisoner's effective ef
toward spiritual salvation, but the awesom

[5] *U.S.v.Ballard,supra,* at page 87.

imminent act of the executioner, as well, creates an almost insurmountable barrier to the necessary positive state of mind (i.e., thoughts of love, charity, benevolence,and graciousness, etc., rather than of hatred and malice, as naturally directed against society and particularly toward the state and its executioner by the prisoner when contemplating his imminent untimely doom).[6]

It should be especially noted that mental cruelty is within the ambit of the cruel and unusual punishment concept. In *Trop v. Dulles*, 356 U.S. 86, the United States Supreme Court held in 1958 that psychological distress is covered by such concept, in holding a sentence of expatriation to be violative of such constitutional principle.

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[6] *Chronicles of San Quentin--The Biography of a Prison*, Kenneth Lamott, 1961 (McKay Publishing Co.), p.231, contains a description of the effect which his impending execution was having on a Negro man named Robert O. Pierce: " * * * he got a mirror fragment and cut his throat as he kneeled to receive the Protestant chaplain's last benediction * * * As he was dragged into the death chamber, he said 'I'm innocent, God, you know I'm innocent. Please,Lord, I am.' After a moment, 'All right, God, if you want to let me go, I won't curse you.' The blood from the gash in his neck was spreading over his white shirt as he was forcibly strapped into the chair. As the door was locked, the witnesses heard him scream, 'God, you son of a bitch, don't let me go like this!"

The cruel and unusual punishment proviso of the Eighth Amendment is a fluid, dynamic concept that is responsive to changing times and conditions, and is not a static, fixed concept that means no more than that originally ascribed to it. The U.S. Supreme Court has acknowledged this important fact on more than one occasion; in commenting upon the elasticity of the cruel and unusual punishment concept, the Court stated that it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[7]

The Supreme Court, in *Weems v. U.S.*, 217 U.S. 349,378, a case involving the cruel and unusual punishment concept, stated as far back as the year 1910 that constitutional protection expands "as public opinion becomes enlightened by a humane justice." The Court in the cases at Bar is simply being asked to scrutinize capital punishment in all of its aspects of cruelty--in the light of modern knowledge and understanding concerning the circumstances and application of the death penalty--and, under our presently evolved standards of decency, to vitiate this inherently cruel, and increasingly unusual, punishment in favor of the at least equally effective deterrent, life imprisonment.

Indeed, the concepts previously discussed, as well as those hereinafter noted (not to foreclose others which the Court *sua sponte* may realistically envisage) will more than serve to counterbalance any claimed "compelling interest" on the part of the state.

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[7] *Trop v. Dulles, supra,* at pages 100,101.

The "compelling interest" on the part of the state which needs to be shown in justification of the deprivation of a basic constitutional right was the subject of the Supreme Court's decision in *Sherbert v. Verner, supra*, and a long line of cases --both before and after *Sherbert*--which not only involved basic religious freedom,but other constitutional rights,as well.

Mental cruelty having been shown to be within the scope of the basic constitutional right to be free from the infliction of "cruel and unusual punishment" in the Eighth Amendment (operative on the states through the Fourteenth Amendment), the question is posed: What could be more cruel than depriving prisoners--most of whom are oriented in the prevailing tradition of spiritual salvation attainable only before death--of the opportunity to realize the most important goal of all? It matters not, from a legal standpoint, whether such goal is attainable in an individual case--were the prisoner to live out the balance of his natural life, unfettered by the hand of the executioner-- or, for that matter, whether such goal is still attainable after death (as some believe to be a possibility), the crucial fact is that it constitutes mental cruelty of the worst sort to deprive a prisoner (by the premature ending of his life by the state) of the tranquility inherent in the knowledge that his available time--in which he can continue to seek his Deity, within the framework of his own religious heritage--is not going to be cut short!

Although the Scriptures note that "the wages of sin is death" (meaning death of the soul, of course, as all must die a physical death), it is possible for some to be expiated in the "twinkling of an eye" (as was the thief on the Cross, St. Dismas, who was told by Jesus, "Truly,I say to you, today you will be with me in Paradise"[8]). It is respectfully submitted that it is not asking too much of the Court to assume that countless death row inmates will not be so fortunate in so short a time (as was the case of the prisoner on the third cross!)

It may be argued, in the case of atheistic or agnostic death row inmates, that equal protection concepts would preclude the Court's acceptance of this religious cruelty facet of Eighth (and Fourteenth) Amendment concepts, on the ground of preferential treatment; however, the cruel and unusual punishment proviso must be weighed in terms of its actual effect on a substantial number of death row inmates (if found to constitute cruel and unusual punishment in such case, equal protection under the Fourteenth Amendment would dictate according irreligious condemned men the right to life also....certainly the latter need the benefit of a continued right to life as much as anyone if our own basic religious heritage in this country--which so strongly emphasizes salvageability--is to be given any meaning at all!)

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8 *New Testament (Revised Standard Version)*, Luke 23:43

II.

OTHER BASES OF MENTAL CRUELTY RESULTING FROM THE DEATH PENALTY

There are many other reasons whereby, under the circumstances obtaining in these cases, the imposition of the death penalty is causative of mental anguish--and, hence, mental cruelty. As noted hereinbefore, mental cruelty is substantially within the ambit of the cruel and unusual punishment prohibition. See *Trop v. Dulles*, *supra*, at pages 101, 102.

Capital punishment has a particularly invidious nature, because it is unfair and unjust in its imposition and application. It generates highly aggravated feelings of mental anguish (hence, mental cruelty) on the part of condemned men who, for the most part, are from less-favored ethnic and socio-economic groups in our country (the condemned men in these cases at Bar are each Negro; they are all poor, as witnessed by this Court's permission for them to proceed in *forma pauperis*).

For the condemned prisoner who knows that he is the subject of invidious discrimination as a member of a disfavored ethnic or socio-economic group whose members (as the prisoners herein) receive a disproportionately large share of death sentences, compared to the general population, capital punishment is thus also promotive of a special kind of mental suffering (far over and above that generated by fear of execution alone in those decidedly few condemned persons of relatively higher social strata)!

Also promotive of mental anguish is the prisoner's realization that his death is really useless, and accomplishes nothing, as a deterrent to serious crime[9]. A careful survey of the FBI *Uniform Crime Reports*, for the years 1959 through 1969 (1970 figures were not available at the time this brief was prepared, such figures being released in mid-August of the year following the reported year) most decidedly shows that capital punishment is no deterrent to capital crime. These significant statistics show that the State of Georgia (in which the prisoners Furman and Jackson were given the death sentence) has had a markedly higher murder and non-negligent homicide rate than that of an abolition State, Wisconsin, the latter State having similar population (as well as population density) characteristics--the latter factor being the presently-recognized factor in causality having the most important significance to the incidence of serious crime. Perhaps of even greater significance is a comparison of the rates of serious crime of the two largest cities in these respective States (Atlanta visavis Milwaukee) which are quite revealing in showing a virtually overwhelming difference in the murder and non-negligent homicide rates (Atlanta,with a population similar to that of Milwaukee, having a markedly higher rate!) The same phenomenon is again noted when comparing South Dakota (having capital punishment) with its near perfect counterpart, North Dakota (which does not have capital punishment)! The Court should take judicial notic

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9 *Crime in the United States* (FBI Uniform Crime Reports), 1959-1969

of all the factors relevant to capital punishment, including the best available statistics (which show clearly that the death penalty does not deter capital crime), as former Justice Arthur Goldberg urged[10]. The Court, in viewing such statistics, may be tempted to conclude that capital punishment is an inducement to the commission of capital crime in many instances. Actually, when one carefully compares the best available data, as between abolition and non-abolition states having similar characteristics (population density,etc.), one finds many more instances of lower serious crime rates in abolition states--in cases where there is any appreciable difference at all.

Former Justice Goldberg, as noted, indicated a duty of the Court to consider all available data in respect to the indication that capital punishment is disproportionately and, hence, an excessively severe punishment in relation to its ostensible social effect (i.e., its assumed deterrence, etc.)

Bedau, in his notable work, *The Death Penalty in America* (1968), which includes Professor Thorsten Sellin's findings, as well as those of other experts in this field, notes that capital punishment has been so found; the basis of the best available evidence (and we should decidedly use what we have, even though it does not attain the degree of precision necessary to a chemical equation) clearly shows that capital punishment is no deterrent to capital crime[11].

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[10] *Harvard Law Review*, 83:1773 (June 1970).

[11] In Bedau's work, page 284, Dr. Sellin states: "Anyone who carefully examines the * data is

The inmates of death row--at least through the "jailhouse lawyers"--are well aware of the fact that capital punishment does not deter capital crime which, it is respectfully submitted, is more than a considerable source of additional mental anguish for death row inmates.

It is not at all comforting, either, to note that Roper's opinion polls--in showing a myriad of up and down changes in public sentiment about capital punishment--showed that a majority of Americans was opposed to the death penalty on February 9, 1958 . In the latter connection, it is also noteworthy that a large majority of this world's civilized governments--other than Communist countries and dictatorships-- have abolished capital punishment!

It is also substantially promotive of mental anguish--hence, mental cruelty--for the condemned prisoner who knows that his death will extinguish all legal rights, including all future rights flowing from evolved concepts of due process[12], when the condemned man compares his own situation with that of a fellow-prisoner who is under a life sentence for the same type of crime (the latter person maintains a continued right to release if facts showing innocence are uncovered, or at least a right to a new trial in the event of future changes in legal concepts applicable to his case (for example, in respect to the changing law as to invalidity of con-

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bound to arrive at the conclusion that the death penalty,as we use it,exercises no influence on the extent ***of capital crimes.

12 Due process rights follow the prisoner

victions because of changing legal concepts as to whether a confession--strenuously objected to at trial, but admitted anyway--was really involuntary).

It is also a source of considerable mental anguish to the condemned man, in comparison to the situation where life imprisonment is the sentence, because of the fact that an inordinate amount of mental suffering will visit his loved ones--family and relatives--with the resulting social stigma (irrespective of the peer group from which such may emanate) which ordinarily will require more than one generation to "live down"!

All of the foregoing are but few of the many facets of extreme mental cruelty involved in the imposition and carrying out of the death penalty.

Moreover--and of extremely important significance--is the fact that the death row environment is causative of severe psychosis, and other types of mental illness[13]. Many adverse psychotic symptoms were noted in article based on a study in this respect by Dr. Harvey Bluestone and Carl L. McGahee, *"Reaction to Extreme Stress: Impending Death by Execution"*, published in the American Journal of Psychiatry, November, 1962. Additionally of significance in showing the callousness of those responsible for executing the death sentence--and note the valid, common law precept that no insane man is to be executed--is the case through the prison walls; *Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1968).

13 *Solesbee v. Balkom*, 339 U.S. 9, 14 (1950),

of a condemned man in the California prison at San Quentin, which is described in the work of Lamott in his *Chronicles of San Quentin--The Biography of a Prison* (David McKay Co.,Inc.,1961), at page 229:

> "Not long ago one condemned man had to undergo two series of electric shock treatments before he was judged to be sufficiently in touch with reality to be killed" (by lethal gas)

What of this man's mental condition prior to this formidable electric shock treatment? If he was in fact insane, which the above indicates to be the case, the state has no business of trying to "jack him up" hurriedly so that he can immediately undergo a horrible death by hydrogen cyanide. It should also be especially noted that the lower Federal court in *Jackson v. Bishop*, 268 F.Supp. 804 (E.D. Ark.1967) held that the use of an electric shocking device in prison to punish inmates is violative of the cruel and unusual punishment provision of the Eighth Amendment (in connection with such prohibition, any electric shocking device which causes convulsions and unconsciousness--which occur during electric shock treatment of insane persons--should be likewise enjoined, particularly if its end result is an immediate execution in the gas chamber!)

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dissenting opinion, Frankfurter,J.

It was reported in the press that the last victim of California's gas chamber had attempted suicide prior to his execution; suicidal ideation,in psychiatric parlance, is practically a determinative indicium of severe mental illness.

Capital punishment also generates an overwhelming amount of mental anguish--hence, mental cruelty--in the prisoner's anticipation of formidable physical pain involved (the physical pain itself,of course, being intrinsically cruel).Two authors of the leading law review article "The Death Penalty Cases" in 56 Calif. Law Rev.1268 (1968) noted what appears to be an inordinate amount of prolonged consciousness (hence,pain) in the executions of two of America's most famous felons (at pages 1339 and 1341 thereof). It is also noteworthy that these authors imply strong agreement with one of your *amici's* basic underlying premises in the first part of this brief that capital punishment infringes religious freedom rights of a prisoner who is or who might become religious (page 1363).

In the case of *Jackson v. Bishop*,it is also extremely significant that the court,speaking through then-Circuit Judge Blackmun, found corporal punishment to violate constitutional proscriptions against cruel and unusual punishment. *A fortiorari* the considerably more harsh, tremendously more painful, execution of death should be abolished, using similar considerations. It is noted that corporal punishment was not held to be violative of the cruel punishment concept several generations ago when such proviso was formulated (a judicial abrogation of capital punishment now accordingly appears more than adequately warranted!)

Capital punishment, by electrocution or by gas[14], is fraught with the possibility of further cruelty by unbridled administrative prerogative in its application. Although electrocution often results in a cruel burning (literally) of the prisoner, lethal gas may also constitute a horrible method of prolonged suffering![15] The death row environment is also being scrutinized by the 5th Circuit(*Sinclair v.Henderson*, Nov 17,1970;No.30025).

[14] *State v. Gee Jon*,211 P.2d 676 (1923)

[15] *Chronicles of San Quentin*,*supra*,page 228.

This Court has heretofore acknowledged an obligation to thoroughly consider and evaluate--free from the judicial strictur of yesteryear--all the relevant factors a circumstances (including many of those no theretofore thought to be judicially cogn zable) in a determination of whether or n a "compelling state interest" exists for particular punishment. The United States Supreme Court in *In re Jenison*, 375 U.S. 1 (1963) --a case involving a woman's refusal to perform service on a jury (due to the proscription in the Sermon on the Mount, "Judge not, that you be not judged" -- remanded the matter to the state court for further consideration in the light of *Sherbert v. Verner, supra.*

The California appellate court has als acknowledged that a "compelling state int erest" must be shown before a particular punishment can be held constitutional[16].

The opinions articulated by another commentator, that there must be a compelli state interest shown when the validity of a law or regulation is in question, are also worthy of note[17].

Capital punishment is utterly devoid o any rehabilitative value. Its carrying ou --within the prison setting--also stifles efforts of the authorities to rehabilitat prisoners incarcerated for other than cap offenses, because of its implied admissio of failure to rehabilitate and its manife disregard for the sanctity of human life.

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16 *People v. Woody*, 394 P.2d 813 (1964)

17 *Wisconsin Law Review Vol. 1966, p. 280 et seq.*

Dr.Sheldon Glueck, the noted Harvard penologist, condemns capital punishment for its adverse consequences on otherwise valid rehabilitative efforts as to those prisoners not under a death sentence, by stating that the death penalty "bedevils the administration of criminal justice and is the stumbling block in the path of general reform in the treatment of crime and criminals". In *Holt v. Sarver*, 309 F.Supp.362 (E.D. Ark.1970), a Federal court held that the entire penitentiary system of Arkansas was violative of cruel and unusual punishment concepts, noting that an effective plan of rehabilitation--which was lacking--is necessary to constitutional validity.

CONCLUSION

The Court is respectfully requested to use its inherent power of judicial notice, in gathering to itself all of the relevant facts which bear on the physical and mental cruelty of the death penalty. It is submitted that the nature of capital punishment, and the formidable circumstances and burdens attendant thereupon, render it unconstitutional in violation of the proscription against cruelty (including mental cruelty resulting from the imminent deprivation of religious freedoms). For the foregoing reasons, the *amici* urge that the judgments below be reversed, thus letting God work his natural, benevolent purposes in this world!

Respectfully submitted,

Paul Raymond Stone,
Attorney for Amici
1901 Huber Road
Charleston, W.Va.

Dated:Aug.25,1971